Supreme Court, U.S.
FILED
MAR 20 2003
CLERK

No. 02-524

In The
Supreme Court of the United States

JANETTE PRICE, WARDEN,

Petitioner,

v.

DUYONN ANDRE VINCENT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

I. Whether a state appellate court's conclusion that a trial court's words and actions did or did not amount to an acquittal for Double Jeopardy Clause purposes is a finding of fact subject to the presumption of correctness on habeas corpus review.

II. Whether the Michigan appellate courts and the lower federal courts correctly concluded that the Double Jeopardy Clause precludes a trial judge who has acquitted a defendant of a charge at the close of the prosecution's case from reinstating that same charge later in the trial.

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STATEMENT OF THE CASE

Proceedings in the State Trial Court

Respondent Duyonn Andre Vincent and two other men, Dameon Perkins and Marcus Hopkins, were tried in the Genesee County Circuit Court in Flint, Michigan, on charges of first-degree murder and using a firearm during the commission of a felony. After the prosecution's case concluded on March 31, 1992, all three defendants moved for a directed verdict on the first-degree murder charge on the ground that there was insufficient evidence of premeditation. J.A. 4-8. In response, the prosecutor argued that there was sufficient evidence of premeditation. J.A. 8-12.

If a defendant makes a motion for a directed verdict at the close of the prosecution's case, Michigan law requires the trial court to decide the motion before the defendant begins his case. See Mich. Ct. R. 6.419(A) ("The court may not reserve decision on the defendant's motion"). Therefore, after each attorney had argued, the trial judge rendered his decision:

> Nothing else? Well my impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. I don't see that the participation of any of the defendants is any different than anyone else as I hear the comment made by Mr. Doll about the short time in which his client was in the vehicle. But I think looking at it in a broad scope as to what part each and every one of them played, if at all, in the event that it's not our premeditation planning episode. It may very well be the circumstance for bad judgement [sic] was

> used in having weapons but the weapons themselves may relate to a type of intent, but don't necessarily have to show the planning of premeditation. I have to consider all the factors. I think that the second Count should remain as it is, felony firearm. And I think that Second Degree Murder is an appropriate charge as to the defendants. Okay.

J.A. 12-13.

After the trial court issued this decision, the attorneys and the judge proceeded to discuss and resolve several other matters, including: (1) whether both juries would be present as each defendant presented his case, J.A. 13-16; (2) the order in which various defendants would present their cases and the expected length of the testimony, J.A. 16-17; (3) the procedure by which the prosecutor would formally announce to each jury that he had completed his case, J.A. 17; and (4) whether certain witnesses would be allowed in the courtroom during portions of the trial unrelated to their testimony. J.A. 17-18. After these issues were resolved, the trial judge had Respondent and the other two defendants removed from the courtroom for the day. J.A. 18.[1]

After Respondent's departure, the prosecutor told the judge that he would like to "make a brief restatement in terms of the First Degree Murder" the following morning. J.A. 18. The judge replied, "Yes, I'll be glad to hear it. Sure, I'm always glad to hear people." J.A. 18. The

[1] Petitioner's Statement of the Case replaces all of these proceedings and the removal of Respondent from the courtroom with a set of asterisk ellipses. Petitioner's Brief at 5.

prosecutor did not make a motion for reconsideration at that time, and the judge did not indicate that his earlier decision was subject to reconsideration. The court then recessed for the day.

The trial court's official docket entries for March 31, 1992, reflect the directed verdict grant, as well as several other rulings the judge made after that point:

> MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER[2] TO 2ND DEGREE MURDER. CT: II. FEL. FIREARM STAY THE SAME. MOTION BY C. ODETTE TO HAVE MARCUS HOPKINS & D. VINCENT JURY REMOVED FROM COURTROOM WHILE D. PERKINS IS ON TRIAL AND VICE VERSA. MTN GRANTED. COURT EXCUSED BOTH JURIES DEFT PERKINS JURY TO RETURN TOMORROW MORNING @ 8:30 A.M. AND DEFTS VINCENT & HOPKINGS [sic] TO RETURN TOMORROW @ 10:00.

J.A. 1.

The next day, April 1, 1992, the prosecutor argued that the judge had erred by granting the directed verdict. J.A. 21-33. Respondent's counsel immediately objected that the Double Jeopardy Clause would prohibit the judge from reversing his decision to acquit Respondent of first-degree murder. J.A. 32-33. The trial judge replied, "Counsel, you have to bear in mind, I've not informed the jury of

[2] In Michigan, a first-degree murder charge is sometimes called "open murder" because the trier of fact is free to choose between first-degree premeditated murder and the included offense of second-degree murder.

any of these things. . . . So the jury knows nothing about any of this." J.A. 33. When Respondent's counsel insisted that a reversal of the ruling would violate the Double Jeopardy Clause, the judge interjected:

> THE COURT: Do you really believe that? You think that when a decision is made that before it's recited to the parties who are directly involved in it and particularly the jury because we're asking now for the jury to not consider certain factors that might be brought to them, that a Court cannot consider what it has done? I don't know that that's right. I, I consider things in great length and I, I try to be an open person, I try to give everybody an opportunity to talk and say anything they want. And I'm not, I'm not a stick in the mud. I just don't stick there and say "well, that's where I am." I try to be open about things and flexible.
>
> MR. ODETTE (Respondent's counsel): That's . . .
>
> THE COURT: You understand what I'm saying?
>
> MR. ODETTE: I do.
>
> THE COURT: And I've not told the jury anything.

J.A. 34

Counsel for one of Respondent's codefendants then joined in the double jeopardy argument, and the judge remarked:

> THE COURT: You think double jeopardy has anything to do with this?

> MS. CUMMINGS: Yes. I believe once you've directed. A verdict –
>
> THE COURT: Why is that?
>
> MS. CUMMINGS: A verdict that that's . . .
>
> THE COURT: I haven't directed a verdict to anybody.
>
> MS. CUMMINGS: You granted our motion.
>
> THE COURT: Oh, I granted a motion but I have not directed a verdict.

J.A. 36. The trial judge then took the matter under advisement, but did not reverse his grant of directed verdict at that time. J.A. 42-43. The judge again explained that he could reconsider his decision because he had not shared his earlier ruling with the jury: "[T]here has been no harm that has come about by the Court's ruling earlier. The jury was not alerted or informed in any way whatsoever as to the, the conclusion this Court drew after arguments of counsel." J.A. 42-43.

Later that day, Respondent presented his defense and testified in his own behalf. At the time Respondent testified, the judge still had not reversed the grant of directed verdict on the first-degree murder count.

It was not until the following day, April 2, 1992, two days after he "granted a motion" and one day after hearing Respondent testify and present his case, that the trial judge reversed his ruling and reinstated the first-degree murder count: "I've reconsidered the ruling that the Court earlier made and I've decided to let the jury make its own determination on the Degrees." J.A. 45-46.

The next day, April 3, 1992, Respondent was convicted of first-degree premeditated murder. He was sentenced to life imprisonment without parole.

Proceedings on Direct Appeal

On his direct appeal, the Michigan Court of Appeals unanimously reversed Respondent's first-degree murder conviction and remanded to the trial court with directions to reduce Respondent's conviction to second-degree murder and to resentence him accordingly. Pet. App. 14a-25a. The Michigan Court of Appeals explained that the trial court's decision to reverse itself and allow further factfinding on the first-degree murder count was contrary to this Court's decision in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986):

> In *Smalis v. Pennsylvania*, the Supreme Court reiterated that a trial court's determination that the evidence is insufficient to convict is an acquittal under the Double Jeopardy Clause and that the Double Jeopardy Clause bars subjecting a defendant to post-acquittal fact-finding proceedings going to the guilt or innocence regarding such a charge. As explained below, we are convinced that the court granted a directed verdict of acquittal to defendant regarding the first-degree murder charge and that the court's subsequent reversal of its decision resulted in post-acquittal fact-finding by the jury when the jury was allowed to consider the first-degree murder charge in violation of defendant's double jeopardy rights.

Pet. App. 19a. The court concluded that Respondent had been acquitted:

> We reject any suggestion that the trial court did not actually direct a verdict of acquittal as to the first-degree murder charge after hearing the arguments of counsel. While the court's words "Well, my impression at this time" may be somewhat ambiguous, the court's following statement: "What we have at the very best is second-degree murder," is not ambiguous. The next morning, the judge acknowledged he had granted the motions for directed verdict. In deciding to reserve ruling, the court referred to the "ruling" it had made earlier, and in submitting the first-degree murder charge to the jury, the court said it had reconsidered the "ruling" it had previously made.

Pet. App. 22a-23a. The Michigan Court of Appeals therefore concluded, relying on *Smalis*, that the trial judge had violated Respondent's Double Jeopardy Clause rights by submitting the first-degree murder charge to the jury:

> The court made a ruling that it later reconsidered. However, once the court rendered its ruling on the record directing a verdict of acquittal on the first-degree murder charge, double jeopardy principles forbade it from changing its mind and allowing the jury to consider a first-degree murder charge. The court's reversal of its directed verdict resulted in further proceedings where the jury resolved factual issues going to the elements of first-degree murder contrary to defendant's right not to be placed twice in jeopardy regarding the first-degree murder charge. *Smalis, supra*.

Pet. App. 23a.

The Michigan Supreme Court reversed and reinstated Respondent's first-degree murder conviction by a vote of four to three. Pet. App. 26a-51a. The Michigan Supreme

Court began its analysis by recognizing that the trial judge's characterization of his own ruling was not controlling and that, therefore, an appellate court must determine "whether the ruling in [defendant's] favor was actually an 'acquittal' even though the District Court characterized it otherwise." Pet. App. 34a (quoting *United States v. Wilson*, 420 U.S. 332, 336 (1975)).

The Michigan Supreme Court majority summarized its decision:

> We hold that in order to qualify as a directed verdict of acquittal there must be either a clear statement in the record or a signed order of judgment articulating the reasons for granting or denying the motion so that it is evident that there has been a final resolution of some or all the factual elements of the offense charged. In this case, the judge's comments concerning the sufficiency of evidence regarding the issue of premeditation and deliberation lacked the requisite degree of clarity and specificity. In addition, there was no formal judgment or order entered on the record to indicate what the exact nature of the ruling was and why. Accordingly, we hold that the responses of the trial judge to the motions for directed verdicts never became final with respect to the charge of first-degree murder. Consequently, the continuation of the trial and subsequent conviction did not prejudice or violate the defendant's constitutional rights.

Pet. App. 42a. In a footnote, the majority explained that "[f]actors that might be considered in evaluating finality, in addition to a clear statement in the record or a signed order, might also include an instruction to the jury that a charge or element of the charge has been dismissed by the

judge or that a docket entry has been made reflecting the trial court's action." Pet. App. 41a-42a, n. 9. The majority did not acknowledge that a docket entry reflecting the trial judge's action had been made in this case.[3]

Since the majority concluded that the trial judge had never granted a directed verdict, it did not squarely reach the Michigan Court of Appeals' holding that a trial judge cannot reverse a grant of directed verdict later in the trial. The majority agreed, however, after a discussion of *Smalis*, that "characterizing the court's comments as a directed verdict would compel us to overturn the defendant's convictions." Pet. App. 35a.

The three dissenting justices concluded that the trial judge had actually terminated Respondent's jeopardy on the first-degree murder charge. Pet. App. 45a-50a. Agreeing with the majority that *Smalis* precludes a trial judge from reversing a directed verdict grant later in the trial, the dissent therefore concluded that the trial judge violated the Double Jeopardy Clause by reinstating the first-degree murder count after Respondent testified. Pet. App. 50a-51a.

Respondent moved for reconsideration in the Michigan Supreme Court, pointing out that a docket entry had been made reflecting the trial judge's decision to grant a directed verdict on the first-degree murder count, but the

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[3] The Michigan Supreme Court apparently was unaware of the docket entry because the State, the appellant in that court, failed to include the trial court's docket entries in its appendix. See Mich. Ct. R. 7.307(A)(2) (appellant's appendix in Michigan Supreme Court "must contain . . . the relevant docket entries both in the lower court and in the Court of Appeals").

court denied reconsideration. *People v. Vincent*, 456 Mich. 1201 (1997). This Court subsequently denied Respondent's petition for a writ of certiorari. *Vincent v. Michigan*, 522 U.S. 972 (1997).

Proceedings On Habeas Corpus

Respondent filed a petition for writ of habeas corpus in the district court in 1998. The magistrate issued a report and recommendation that the writ should be granted and that Respondent's conviction should be reduced to second-degree murder. Pet. App. 52a-77a. The district court overruled Petitioner's objections to the report, adopted the report as the court's own opinion, and granted the writ on November 3, 2000. Pet. App. 78a-83a.

The district court held that since the trial judge's words and actions were uncontested, the question of whether those words and actions amounted to an acquittal was a legal question not subject to the presumption of correctness. Pet. App. 71a, 79a. The district court concluded that the trial judge's decision on the motion for directed verdict "was clearly a determinative ruling on the sufficiency of the evidence of premeditation and deliberation and constituted a verdict of acquittal on the first-degree murder charge for double jeopardy purposes." Pet. App. 72a (citing *United States v. Ball*, 163 U.S. 662, 671 (1896)). The court observed that, "[i]ndeed, that decision was formalized by the docket entry of March 31, 1992, indicating that the charge of open murder was amended to second-degree murder." Pet. App. 72a (footnote omitted). Finally, the district court held, relying on *Smalis*, that the trial judge's reversal later in the trial subjected

Respondent to further factfinding proceedings in violation of the Double Jeopardy Clause. Pet. App. 75a, 80a-81a.

The United States Court of Appeals for the Sixth Circuit affirmed. Pet. App. 1a-12a. The Sixth Circuit agreed with the district court that the question of whether the trial judge had acquitted Respondent was a question of law not subject to the presumption of correctness. Pet. App. 9a-10a. After examining the trial judge's statements and the docket entry, the Sixth Circuit concluded that "when the trial judge granted the motion for directed verdict on March 31, 1992, his actions constituted a grant of an acquittal on the first-degree murder charge such that jeopardy attached." Pet. App. 12a. Finally, the Sixth Circuit agreed with the Michigan Court of Appeals, the Michigan Supreme Court, and the district court that the Double Jeopardy Clause bars a trial judge who has acquitted a defendant of a charge from reinstating that charge later in the trial. Pet. App. 12a.

On January 10, 2003, this Court granted the petition for writ of certiorari.

SUMMARY OF ARGUMENT

The Michigan Supreme Court's conclusion that the trial judge never granted an acquittal on the first-degree murder count was not a finding of fact, and the district court and the Sixth Circuit therefore correctly refused to apply the presumption of correctness to that conclusion. This Court has specifically held that an appellate court's characterization of a trial judge's words and actions for purposes of the Double Jeopardy Clause, like the trial

judge's own characterization of those words and actions, is a legal conclusion.

The question of whether the district court properly applied the standard of review from the Anti-Terrorism and Effective Death Penalty Act (AEDPA) to the Michigan Supreme Court's legal conclusion is not before this Court because Petitioner did not raise this issue either in this Court or in the Sixth Circuit. It is clear, however, that the district court did properly apply the AEDPA standard of review to the Michigan Supreme Court's decision. The district court correctly found that the Michigan Supreme Court's holding that a directed verdict of acquittal must be reduced to writing or otherwise formalized is contrary to, or an unreasonable application of, many of this Court's precedents. The Michigan Supreme Court's conclusion that Respondent was not acquitted of first-degree murder is patently unreasonable given the trial judge's clear decision granting the motion for directed verdict, his repeated statements in which he later acknowledged that he had granted the motion, and the trial court's docket entry reflecting the grant. Since the Michigan Supreme Court announced that a docket entry could satisfy its new test but ignored the docket entry in this case, that court's decision is so patently erroneous that Respondent would prevail even if the presumption of correctness applied.

The Michigan appellate courts and the lower federal courts correctly held that this Court's precedents bar a trial judge from reversing a directed verdict grant later in the trial. Since the Michigan appellate courts held in favor of Respondent on this issue, Respondent does not have the burden of showing that a contrary decision would have satisfied the AEDPA standard of review, but this Court's decision in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986),

demonstrates that Respondent would be able to satisfy that burden.

Smalis establishes that a midtrial acquittal on some counts cannot be reversed even in the context of a continuing trial because it would subject the defendant to further factfinding proceedings on the acquitted counts. Courts that have applied *Smalis* to similar situations have uniformly held that the Double Jeopardy Clause bars a trial judge from reversing a directed verdict later in the trial. This bright line rule is equivalent to the rule that a jury acquittal is final when the jury is discharged immediately after delivering the verdict. While some courts have held that an immediate motion for reconsideration may be considered, once the parties and the judge move on to other matters or take a recess, the defendant must be able to rely on the acquittal as he plans his defense and makes critical decisions as to the remaining charges. A rule that a judge could reverse a directed verdict later in the trial would be inconsistent with *Smalis* itself and would subject a defendant to continuing anxiety over the possibility that his acquittal might be reversed after he has made crucial decisions in reliance on the acquittal.

Respondent was subjected to postacquittal factfinding in violation of the Double Jeopardy Clause. After the trial judge announced his decision, the parties moved on to other matters and then took an overnight recess, during which Respondent had to decide how to defend against the remaining charges the following day. The trial judge then announced that he would reconsider his decision, but did not reverse the acquittal until the day after Respondent had testified and presented his entire defense case. Since Respondent was twice placed in jeopardy on the

first-degree murder charge, the federal courts correctly granted the writ of habeas corpus.

ARGUMENT

I. The Michigan Supreme Court's conclusion that the trial judge never acquitted Respondent of first-degree murder is a legal conclusion not subject to the presumption of correctness, and the federal courts correctly found that conclusion to be unreasonable.

A. An appellate court's conclusion that a trial judge has or has not acquitted a criminal defendant for Double Jeopardy Clause purposes is not a finding of fact subject to the presumption of correctness on habeas corpus review.

Petitioner first argues that the Sixth Circuit erred in refusing to afford the presumption of correctness to the Michigan Supreme Court's conclusion that the trial court had not acquitted Respondent of the first-degree murder charge. Petitioner's Brief at 14-24. See 28 U.S.C. § 2254(e)(1) (in habeas corpus proceeding, "a determination of a factual issue made by a State court shall be presumed to be correct"). According to Petitioner, "the Michigan Supreme Court decided Vincent's claim on a purely factual basis, finding as a matter of fact that the trial court did not grant the motion for directed verdict[.]" Petitioner's Brief at 16.

This Court's decision in *Smalis v. Pennsylvania*, 476 U.S. 140 (1986), forecloses Petitioner's argument. In *Smalis*, this Court unanimously held that it was not

bound by the Pennsylvania Supreme Court's characterization of the trial judge's ruling in that case: "[J]ust as 'the trial judge's characterization of his own action cannot control the classification of the action under the Double Jeopardy Clause,' *so too the Pennsylvania Supreme Court's characterization, as a matter of double jeopardy law, of an order granting a demurrer is not binding on us.*" *Id.*, 476 U.S. at 144 n. 5 (emphasis added; internal brackets deleted; quoting *United States v. Scott*, 437 U.S. 82, 96 (1978)).

If this Court had regarded the Pennsylvania Supreme Court's characterization of the trial court's action in *Smalis* as a factual matter, this Court would have deferred to that characterization, even on direct review. See, *e.g.*, *Hernandez v. New York*, 500 U.S. 352, 364-366 (1991) (plurality opinion) (applying "deferential standard of review" to state court factual finding that prosecutor did not intentionally discriminate against Latino jurors). This Court afforded no such deference in *Smalis* because the characterization of a trial judge's words and actions "as a matter of double jeopardy law" is, by definition, a legal matter. *Smalis*, 476 U.S. at 144 n. 5.

The Michigan Supreme Court itself understood that its task was not to find facts but to characterize the trial judge's words and actions as a matter of double jeopardy law:

> We recognize that a judge's characterization of a ruling and the form of the ruling may not be controlling. The Court must inquire whether the ruling in [defendant's] favor was actually an "acquittal" even though the District Court characterized it otherwise. Ultimately what we must determine is whether the ruling of the judge,

> whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.

Pet. App. 34a (internal citations and quotation marks omitted) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 & n. 9 (1977)). The Michigan Supreme Court thus correctly recognized that it was not bound by the trial judge's own conclusion that he had not granted a directed verdict because that conclusion is not a finding of fact.

The trial judge's characterization of his own actions perfectly illustrates why such a characterization is not a finding of fact. There was no dispute as to what the trial judge said and did in response to Respondent's motion for directed verdict. Indeed, the trial judge himself stated that he made a "decision," "granted a motion," made a "ruling," and came to a "conclusion." J.A. 34, 36, 42, 45-46. The only question was what those words and actions meant *as a matter of double jeopardy law*. The trial judge took the position, *as a matter of double jeopardy law*, that although he had made a ruling and granted a motion for directed verdict, such a ruling does not ripen into an acquittal until the judge informs the jury. J.A. 33, 34, 36, 42-43. The trial judge's position was wrong, *as a matter of double jeopardy law*, because it is directly contrary to *Sanabria v. United States*, 437 U.S. 54, 64 n. 18 (1978), where this Court held that, "[i]t is without constitutional significance that the court entered a judgment of acquittal rather than directing the jury to bring in a verdict of acquittal or giving it erroneous instructions that resulted in an acquittal."

The Michigan Supreme Court's conclusion was similarly based on legal principles. The Michigan Supreme Court held, *as a matter of double jeopardy law*, that a trial

judge's oral statement granting a directed verdict motion is not sufficient to terminate jeopardy unless accompanied by certain formal trappings: "A judge's thinking process should not have final or binding effect until formally incorporated into the findings, conclusions, or judgment. . . . None of the indicia of formality associated with final judgments are [sic] present in the trial judge's comments at issue here. There was no statement in the record that an order or judgment was being entered at all." Pet. App. 40a. The Michigan Supreme Court then went on to explain that its newly minted formal trappings requirement could be satisfied by, among other things, "a docket entry . . . reflecting the trial court's action." Pet. App. 42a n. 9.[4]

Petitioner cites no precedent treating as a finding of fact an appellate court's conclusion, for double jeopardy purposes, that a trial judge has or has not granted an acquittal, and Respondent is not aware of any such precedent. The reason such precedent apparently does not exist is that it would be squarely contrary to *Smalis*.

Petitioner does cite *Parker v. Dugger*, 498 U.S. 308 (1991), for the unremarkable proposition that an appellate court's characterization of an ambiguous transcript can amount to a finding of fact. Petitioner's Brief at 21-22. The issue in *Parker*, however, was the purely factual question

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[4] As discussed in part B of this argument, *infra*, the Michigan Supreme Court's holding that an acquittal must be accompanied by certain formalities in order to count for double jeopardy purposes is just as contrary to this Court's precedents as the trial judge's conclusion that a directed verdict would not become final until he informed the jury.

of whether the trial judge had or had not considered a mitigating circumstance during a capital sentencing. *Id.* 498 U.S. at 320. Indeed, in the sentence immediately following the end of the block quote reproduced on pages 21-22 of Petitioner's Brief, this Court observed, "This is not a legal issue; no determination of the legality of Parker's sentence under Florida law necessarily follows from a resolution of the question of what the trial judge found." *Parker*, 498 U.S. at 320. The exact opposite is true here; the issue in this case is a legal issue, and the legality of Respondent's conviction does necessarily follow from a resolution of the question of whether the trial court granted a directed verdict.

In sum, the Michigan Supreme Court's conclusion that Respondent was never acquitted of first-degree murder for purposes of double jeopardy is not a finding of fact. Therefore, the Sixth Circuit correctly refused to afford the presumption of correctness to that holding. However, even if the presumption of correctness had applied, the Michigan Supreme Court's failure to consider the dispositive docket entry and its conclusion that the judge never actually ruled on the directed verdict motion would have been more than enough to overcome that presumption.

B. Since Petitioner never challenged in either the Sixth Circuit or this Court the district court's application of the AEDPA standard of review to the Michigan Supreme Court's legal conclusions, that question is not properly before this Court, but the district court properly applied those standards to grant the writ.

Petitioner's entire first argument is devoted to the proposition that the Michigan Supreme Court's ruling is a pure finding of fact. Therefore, Petitioner does not argue that the district court or the Sixth Circuit improperly applied the standard of review from 28 U.S.C. § 2254(d)(1), that is, whether the Michigan Supreme Court's decision that Respondent was never acquitted was contrary to, or an unreasonable application of, this Court's precedents. See *Williams v. Taylor*, 529 U.S. 362 (2000). Since Petitioner also did not raise this argument in the Petition for Writ of Certiorari, this question is not properly before the Court.

Petitioner could not have raised that issue in this Court because she never raised it below. Petitioner, the appellant in the Sixth Circuit, never argued in that court that the district court had misapplied § 2254(d)(1), instead choosing to argue only, as she does now, that the Michigan Supreme Court's decision was a pure finding of fact subject to the presumption of correctness. Appellant's Sixth Circuit Brief at 12-20.[5]

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[5] Amici curiae Texas, et al., and the Criminal Justice Legal Foundation (CJLF), however, both devote their briefs to an issue not before this Court, namely, whether the Sixth Circuit correctly applied

(Continued on following page)

That the district court properly applied the *Williams* standard is clear from the record. In an opinion adopted by the district court, the magistrate judge discussed the *Williams* standard of review at length, meticulously examined the record and this Court's relevant precedents, and concluded that the Michigan Supreme Court's decision amounted to an unreasonable application of this Court's precedents. Pet. App. 62a-76a. Even though Petitioner does not contend otherwise, Respondent shall briefly demonstrate that the district court correctly applied the *Williams* standard to this case.

On March 31, 1992, at the conclusion of the prosecution's case and after argument of counsel, the trial judge specifically found that the prosecution had failed to prove premeditation, an essential element of first-degree premeditated murder, and that the appropriate charge was therefore second-degree murder. J.A. 12-13. After the trial judge announced this ruling, none of the parties sought any clarification or reconsideration. Instead, in a clear indication that all concerned understood that the judge had made his decision, the judge and the attorneys simply

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the *Williams* standard of review to the Michigan Supreme Court's conclusion that Respondent was never acquitted. Texas and CJLF overlook the fact that the district court plainly and correctly applied the *Williams* standard to the Michigan Supreme Court's holding, and that the Sixth Circuit did not discuss this point in detail *because Petitioner never challenged the district court's application of the Williams standard* during her appeal to the Sixth Circuit. In other words, amici chastise the Sixth Circuit for not explicitly discussing an issue the appellant never raised in that court. Both amici further weaken their arguments that the Michigan Supreme Court's conclusion was reasonable by failing to even mention the existence of the docket entry reflecting the trial judge's grant of the directed verdict.

moved on to other matters and proceeded to resolve several issues as to how the remainder of the trial would be conducted. JA. 13-18.

The trial judge's action was then recorded, in unambiguous language, in the court's official docket entries. J.A. 1. The trial judge himself later referred to the "ruling that the Court earlier made," J.A. 45, and observed at various times that he had made a "decision," J.A. 34, "granted a motion" for a directed verdict, J.A. 36, made a "ruling," J.A. 42, and reached a "conclusion." J.A. 42. The judge consistently took the legally incorrect position that he could revisit his ruling later in the trial simply because he had not told the jury about it. Cf. *Sanabria*, 437 U.S. at 64 n. 18 (holding that it is "without constitutional significance" that judge granted acquittal himself without involving jury).

The Michigan Supreme Court's conclusion that none of this amounted to an acquittal was predicated on two premises. First, the Michigan Supreme Court reasoned that an oral acquittal not accompanied by a written judgment or some other formal trappings was insufficient to terminate jeopardy. Pet. App. 38a-42a. This conclusion is, however, directly contrary to, among other precedents of this Court, *United States v. Ball*, 163 U.S. 662 (1896), which held an acquittal was final despite the entry of a defective judgment because "a verdict of acquittal, *although not followed by any judgment*, is a bar to a subsequent prosecution for the same offense." *Id.* at 671 (emphasis added).

The Michigan Supreme Court's emphasis on the form of the acquittal instead of its substance is contrary to, or at least an unreasonable application of, several of this

Court's precedents in addition to *Ball*. In *Martin Linen*, this Court explained, "we have emphasized that what constitutes 'an acquittal' is not to be controlled by the *form* of the judge's action. Rather, we must determine whether *the ruling* of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." 430 U.S. at 571 (emphasis added) (citations omitted). See also *Kepner v. United States*, 195 U.S. 100, 133 (1904) ("to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment"); *Green v. United States*, 355 U.S. 184, 187, 190-191 (1957) (holding that guilty verdict on lesser offense amounts to acquittal on greater offense, even though resulting judgment does not reflect "express verdict" of acquittal on greater offense); *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308 (1984) ("Acquittals, unlike convictions, terminate the initial jeopardy. This is so whether they are 'express or implied by a conviction on a lesser offense.'") (quoting *Price v. Georgia*, 398 U.S. 323, 329 (1970)).

The trial judge here, by his own admission, made a "ruling" that the prosecution had failed to prove premeditation, one of the factual elements of the charged offense of first-degree murder. The Michigan Supreme Court's holding that this ruling was inadequate because it was not accompanied by certain formalities is thus contrary to, or at the very least an unreasonable application of, this Court's precedents that teach that it is the substance, not the form, of an acquittal that matters for double jeopardy

purposes and that such an acquittal is final even if it is never formalized.[6]

Second, the Michigan Supreme Court expressly acknowledged that the formal trappings requirement it had just created could be satisfied if "a docket entry has been made reflecting the trial court's action." Pet. App. 42a n. 9. However, the Michigan Supreme Court failed to acknowledge that precisely such a docket entry had been made in this case on March 31, 1992: "MOTIONS BY ALL ATTYS FOR DIRECTED VERDICT. COURT AMENDED CT: I OPEN MURDER TO 2ND DEGREE MURDER." J.A. 1. Thus, even under the criteria set forth by the Michigan Supreme Court, Respondent's jeopardy on the first-degree murder count terminated on March 31, 1992.[7]

Petitioner cites *People v. Kelley*, 449 N.W.2d 109 (Mich. Ct. App. 1989), for the proposition that a Michigan docket entry is not equivalent to a written order for

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[6] In addition, the Michigan Supreme Court's emphasis on the absence of a written order is particularly unreasonable when, as here, the trial court is required to make a ruling in the middle of a continuing jury trial. It would often be impractical to require a judge to suspend a jury trial so that he or she may draft and formally issue a written order in order to satisfy an appellate court. The important point, of course, is that not only would such a requirement be impractical but it would also be contrary to this Court's precedents discussed above.

[7] As discussed in footnote 3, *supra*, the Michigan Supreme Court was apparently unaware of the docket entry because the State, the appellant in the Michigan Supreme Court, failed to include it in its appendix, in violation of Mich. Ct. R. 7.307(A)(2). However, the docket entry was already part of the record in the Michigan Supreme Court, see Mich. Ct. R. 7.311(A) (an appeal in the Michigan Supreme Court "is heard on the original papers, which constitute the record on appeal"), so that court should have been aware of the docket entry despite the State's error.

purposes of computing the time to appeal and also points out that it is not clear whether the trial judge made the docket entry himself. Petitioner's Brief at 27 & n. 3. Petitioner misses the point that the Michigan Supreme Court announced in this very case that a docket entry, whether made by the judge or a clerk, is precisely the sort of formality that it would find sufficient to finalize a directed verdict

As the district court observed, the docket entry the Michigan Supreme Court ignored also demonstrates that its conclusion is an unreasonable application of this Court's precedents. Pet. App. 72a, 75a. The docket entry confirms that the trial court itself understood that the judge had made a dispositive ruling on March 31, 1992, just as the trial judge's later statements, in which he explained he made a "ruling" and "granted a motion," confirm that same understanding. J.A. 36, 42, 45.

In short, the Michigan Supreme Court issued a decision that was contrary to, or an unreasonable application of, this Court's binding precedents. Despite this Court's decisions requiring an appellate court to review a trial court's words and actions in a non-formalistic manner to determine whether a defendant has been acquitted, the Michigan Supreme Court placed primary emphasis on the absence of formal trappings, and then compounded its error by failing to realize that the trial court's actions had actually met the formal criteria it had just created. Therefore, the district court correctly granted the writ of habeas corpus and the Sixth Circuit correctly affirmed that decision after rejecting each of the arguments Petitioner actually made in that court.

II. The Michigan appellate courts and the lower federal courts correctly held that the Double Jeopardy Clause barred the trial judge from reversing his grant of acquittal on the first-degree murder charge later in the trial and subjecting Respondent to postacquittal fact-finding proceedings.

A. Respondent has no burden to show that a state court decision *in his favor* is contrary to, or an unreasonable application of, this Court's precedents.

Petitioner argues that a trial judge may reverse his own grant of an acquittal later in the same trial, at least before further proceedings occur. As a preliminary matter, however, Petitioner also argues that she must prevail even if her argument is wrong because, according to Petitioner, this Court's precedents fail to clearly establish that a trial judge may not reverse his decision to grant an acquittal later in the trial. Petitioner's Brief at 28-38. Therefore, Petitioner argues, a state court decision holding that a trial judge may reverse his grant of an acquittal later in the trial would not be contrary to, or an unreasonable application of, this Court's precedents as required for habeas corpus relief under 28 U.S.C. § 2254(d)(1). See *Williams*, 529 U.S. at 412.

There are two fundamental problems with Petitioner's preliminary argument. First, as Respondent shall demonstrate in parts B and C of this argument, *infra*, this Court's precedents, particularly *Smalis*, do clearly establish that a trial judge's grant of a midtrial motion for acquittal on some counts terminates jeopardy and bars all further factfinding proceedings on those counts.

Second, Petitioner's argument ignores the point that the Michigan appellate courts held in favor of *Respondent* on this issue. In other words, Petitioner would have this Court "defer" to a state court "decision" that the Michigan courts affirmatively rejected. The Michigan Court of Appeals held, relying on *Smalis*, that the trial judge could not reverse his grant of directed verdict later in the trial without subjecting Respondent to postacquittal factfinding proceedings in violation of the Double Jeopardy Clause. Pet. App. 19a. On the State's appeal to the Michigan Supreme Court, that court agreed, again relying on *Smalis*, that a trial judge may not reverse a grant of directed verdict later in the trial and that, therefore, "characterizing the [trial] court's comments as a directed verdict would compel us to overturn [Respondent's] convictions." Pet. App. 34a-35a.

It is therefore Petitioner, not Respondent, who believes that the Michigan courts incorrectly applied this Court's precedents on the question of whether a trial judge may reverse a grant of directed verdict later in the trial. It is not Respondent's burden to show that the state appellate courts issued a decision contrary to, or an unreasonable application of, this Court's precedents on the second issue before this Court when Respondent maintains that the state appellate courts decided that issue correctly.

A habeas corpus petitioner must, of course, demonstrate that the state court "decision" under challenge is contrary to, or an unreasonable application of, this Court's precedents. *Williams*, 529 U.S. at 412. Accordingly, Respondent challenged in his habeas corpus petition the Michigan Supreme Court's decision that the trial judge never granted a directed verdict, and the district court held that this decision is contrary to, or an unreasonable

application of, this Court's precedents. See Argument I(B), *supra*. Respondent did not have to further prove to the district court that the Michigan appellate courts made unreasonable decisions on issues where Respondent believes they pronounced the law correctly. To put it simply, AEDPA requires federal courts to give the benefit of the doubt to objectively reasonable state court decisions, see *Woodford v. Visciotti*, 537 U.S. ___, 123 S.Ct. 357, 360 (2002), but AEDPA certainly does not require federal courts to give any such deference to prosecutorial arguments that the state courts themselves affirmatively rejected.

That said, Respondent shall now show in the remainder of this argument that even if the Michigan appellate courts *had* held that a trial judge is free to reverse his own grant of a directed verdict later in the trial, that decision would have been contrary to, or an unreasonable application of, this Court's precedents, especially *Smalis*.

B. This Court's precedents establish that a directed verdict of acquittal terminates jeopardy on the acquitted charge and precludes any further factfinding proceedings, even if a second trial is not required.

In an unbroken line of cases stretching back more than a century, this Court has recognized that the Double Jeopardy Clause accords absolute finality to an acquittal, even an acquittal unaccompanied by any formal judgment, if reversal of that acquittal would require any further factfinding proceedings going to the defendant's guilt or innocence. "Perhaps the most fundamental rule of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise,

without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *Martin Linen*, 430 U.S. at 571 (quoting *Ball*, 163 U.S. at 671); see also *Green*, 355 U.S. at 188 ("it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.'") (quoting *Ball* at 671). As one leading double jeopardy scholar explained, "[A]n acquittal always bars further proceedings. This is the only absolute rule of traditional double jeopardy analysis, and the Supreme Court has clung tenaciously to it through a series of cases that invited exceptions." George C. Thomas, III, *An Elegant Theory of Double Jeopardy*, 1988 U.Ill. L. Rev. 827, 852 (1988).

"[A] trial court's finding of insufficient evidence also is the equivalent of an acquittal[.]" *Richardson v. United States*, 468 U.S. 317, 325 n. 5 (1984) (citing *Hudson v. Louisiana*, 450 U.S. 40, 44-45, n. 5 (1981)). Even when the trial judge in a jury trial acquits a defendant on an "egregiously erroneous foundation[,]" that acquittal is as final as a jury acquittal. *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). See also *Martin Linen*, 430 U.S. at 573 (recognizing that *Fong Foo* established trial judge's directed verdict grant as "binding authority for purposes of double jeopardy"); *Sanabria*, 437 U.S. at 64, 69 (holding trial judge's midtrial acquittal on one count, "however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review of the trial court's error"); cf. *United States v. Scott*, 437 U.S. 82 (1978) (holding that Double Jeopardy Clause does not bar reversal of trial court's midtrial dismissal on grounds unrelated to guilt or innocence); *United States v. Wilson*, 420 U.S. 332 (1975) (holding that Double Jeopardy Clause does not bar reversal of trial judge's decision to acquit defendant after jury convicted him since reversal would not require further factfinding proceedings).

In *Smalis*, this Court unanimously held that after a trial judge grants a directed verdict during a trial, the Double Jeopardy Clause bars not only a new trial on the acquitted counts but also a continuation of the same trial on those counts. As the Michigan Court of Appeals and the Michigan Supreme Court each recognized, *Smalis* is indistinguishable from Respondent's case in all relevant respects, and the legal principles enunciated in *Smalis* therefore preclude a trial judge from reversing a grant of directed verdict later in the trial.

The defendants in *Smalis*, like Respondent, were tried on multiple charges. At the conclusion of the prosecution's case, the trial judge ruled that the evidence was legally insufficient to support a guilty verdict on three of the charges and that the trial would therefore continue only on the remaining four charges. *Commonwealth v. Smalis*, 480 A.2d 1046, 1048 & n. 1 (Pa. Super. Ct. 1984). The prosecution took an immediate appeal from this decision and a second appeal from the trial judge's subsequent ruling reaffirming his first decision, and the trial judge stayed completion of the trial pending the appeals. *Id.* at 1048 & nn. 1-2. The Pennsylvania Superior Court held that the Double Jeopardy Clause barred the appeals because a reversal of the trial judge's decision would require further proceedings devoted to the resolution of factual issues. *Id.* at 1052.

After the Pennsylvania Supreme Court reinstated the prosecution's appeals, *Commonwealth v. Zoller*, 490 A.2d

394 (Pa. 1985), this Court granted certiorari and unanimously reversed. This Court first held that the trial judge's ruling amounted to an acquittal for Double Jeopardy Clause purposes, 476 U.S. 140, 144 & n. 5, and then rejected the Commonwealth's argument that a reversal of that acquittal would not violate the Double Jeopardy Clause:

> The Commonwealth argues that its appeal is nonetheless permissible under *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294 (1984), because resumption of petitioners' bench trial following a reversal on appeal would simply constitute "continuing jeopardy." But *Lydon* teaches that "[a]cquittals, unlike convictions, terminate the initial jeopardy." 466 U.S. at 308. Thus, whether the trial is to a jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause. *Arizona v. Rumsey*, 467 U.S. 203, 211-212 (1984).
>
> When a successful postacquittal appeal by the prosecution would lead to proceedings that violate the Double Jeopardy Clause, the appeal itself has no proper purpose. Allowing such an appeal would frustrate the interest of the accused in having an end to the proceedings against him. The Superior Court was correct, therefore, in holding that the Double Jeopardy Clause bars a post-acquittal appeal by the prosecution not only when it might result in a second trial, but also if reversal would translate into "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged." *Martin Linen*, 430 U.S. at 570 (1977).

Smalis, 476 U.S. at 145-146 (footnotes and internal citation omitted). The Court concluded, "We hold, therefore, that the trial judge's granting of petitioners' demurrer was an acquittal under the Double Jeopardy Clause, and that the Commonwealth's appeal was barred because reversal would have led to further trial proceedings." *Id.* at 146.

C. *Smalis* establishes that a trial judge who reverses his or her directed verdict grant later in the trial subjects the defendant to postacquittal factfinding proceedings in violation of the Double Jeopardy Clause.

It follows immediately from *Smalis* that a grant of a directed verdict cannot be reversed later in the trial because that "reversal would translate into further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged." *Id.* It is therefore not surprising that the appellate courts that have applied *Smalis* to a trial judge's reversal of a directed verdict, including the Michigan Court of Appeals and the Michigan Supreme Court in this case, have concluded that the Double Jeopardy Clause forbids such a reversal. See, e.g., *State v. Millanes*, 885 P.2d 106, 109-111 (Ariz. Ct. App. 1994) (judge could not reverse directed verdict grant on motion for reconsideration); *Brooks v. State*, 827 S.W.2d 119, 121-123 (Ark. 1992) (judge's oral grant of directed verdict terminated jeopardy and precluded later reconsideration); *Lowe v. State*, 744 P.2d 856, 856-858 (Kan. 1987) (jeopardy terminated with oral grant of directed verdict so as to preclude reversal next day). Other courts have reached the same conclusion from this Court's earlier precedents even without relying on *Smalis*. See, e.g.,

United States v. Blount, 34 F.3d 865, 868-869 (9th Cir. 1994) (judge's oral grant of directed verdict terminated jeopardy so as to preclude court's reconsideration the following day); *Caldwell v. State*, 803 So.2d 839, 841 (Fla. Dist. Ct. App. 2001) (judge could not reverse directed verdict granted at close of prosecution's case after hearing defendant's case); *People v. Henry*, 769 N.E.2d 34, 41-44 (Ill. App. Ct. 2001) (judge could not reverse oral directed verdict grant after recess and further argument); *Barnes v. State*, 9 S.W.3d 646, 647-651 (Mo. Ct. App. 1999) (judge could not reverse directed verdict granted at close of prosecution's case after defendant presented evidence); *State v. Blacknall*, 672 A.2d 1170, 1173-1176 (N.J. Super. Ct. 1995) (same), *aff'd*, 672 A.2d 1132 (N.J. 1996).

By contrast, those lower courts that have held that a judge may reverse his or her directed verdict grant later in the trial have almost uniformly failed to even cite *Smalis* and have held, directly contrary to *Smalis*, that this procedure does not violate double jeopardy simply because it does not require a second trial. Most of the courts espousing that view have relied on the Second Circuit's pre-*Smalis* decision in *United States v. LoRusso*, 695 F.2d 45, 50 (2d Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983). In *LoRusso*, the Second Circuit relied on the argument, subsequently rejected in *Smalis*, that a directed verdict may be reversed so long as a second trial is not required:

> [W]e see no reason why the trial court in the present case was not free before the entry of judgment to amend its own ruling *since it did so without subjecting the defendants to a second trial*. . . . In the circumstances of this case, where the court's oral decision was followed promptly by the modification providing for the reduction instead of the elimination of count 2, and where the reduced count could be, and was, submitted in the normal course of the trial *to the original jury*, we conclude that the action of the trial court did not violate principles of double jeopardy.

LoRusso, 695 F.2d at 54 (emphasis added; footnote omitted). The Second Circuit continues to follow *LoRusso*, apparently unaware that *Smalis* rejected the reasoning underlying that decision. See *United States v. Washington*, 48 F.3d 73, 79 (2d Cir.) (relying on *LoRusso* to conclude that trial judge could reverse grant of acquittal later in trial because reversal did not result in "second trial" or "successive prosecution"), *cert. denied*, 515 U.S. 1151 (1995); see also *United States v. Rahman*, 189 F.3d 88, 132 (2d Cir. 1999) (relying on *LoRusso* to conclude judge could reverse grant of acquittal after weekend recess, particularly since jury was not informed), *cert. denied*, 528 U.S. 1094 (2000). A few other lower courts have approvingly cited *LoRusso* in dicta while failing to cite *Smalis*. See *United States v. Byrne*, 203 F.3d 671, 673-675 (9th Cir. 2000) (approvingly citing *LoRusso* but holding that trial judge never granted directed verdict because she announced "in the same colloquy" that her decision was not final), *cert. denied*, 531 U.S. 1114 (2001); *United States v. Baggett*, 251 F.3d 1087, 1092-1097 (6th Cir. 2001) (approvingly citing *LoRusso* but holding that trial judge never granted directed verdict motion until after jury's verdict), *cert. denied*, 534 U.S. 1167 (2002); see also *State v. Iovino*, 524 A.2d 556, 557-560 (R.I. 1987) (holding, without citation to *Smalis* or *LoRusso*, that trial judge could reverse grant of directed verdict since "defendant was not faced with any threat of reprosecution beyond the jury already impaneled to hear his case"); *Campbell v. Schroering*, 763 S.W.2d 145, 147 (Ky. Ct. App. 1988) (holding, without

citation to any authority, that judge could reverse directed verdict before jury discharged); *State v. Sperry*, 945 P.2d 546 (Or. Ct. App. 1997) (holding, without citation to *Smalis* or *LoRusso*, that trial judge could reverse directed verdict grant following day).[8]

In short, there is a post-*Smalis* split of lower court authority on the question of whether the Double Jeopardy Clause forbids a trial judge from reversing a directed verdict grant later in the trial. However, the lower courts that have held that a trial judge may do so have almost uniformly reached that conclusion by overlooking this Court's unanimous decision in *Smalis* and relying instead on reasoning that this Court firmly rejected in *Smalis*. The lower courts that have actually considered and applied *Smalis* to this situation have ruled that a trial judge may not reverse a directed verdict grant later in the trial because doing so subjects the defendant to postacquittal factfinding proceedings.

The United States argues, however, that *Smalis* is distinguishable from this case because *Smalis* involved an appeal, as opposed to the trial judge's reconsideration of

[8] *In the Matter of Lionel F.*, 558 N.E.2d 30 (N.Y.), *cert. denied*, 498 U.S. 923 (1990), appears to be the only decision to cite *Smalis* and still hold, relying on *LoRusso*, that a judge may reverse a directed verdict later in the trial. The majority in *Lionel F.* distinguished *Smalis* on the ground that *Smalis* "involved a prosecutor's appeal from an order of dismissal in a trial long since concluded. The order had been entered and was clearly final." *Id.* at 31. Thus, the *Lionel F.* majority simply misread *Smalis*: the trial in *Smalis* had not "long since concluded" but was to continue on the remaining counts, and the Pennsylvania Superior Court expressly declined to decide whether the trial court's decision was final for appellate purposes. 480 A.2d at 1048 & nn. 1-2.

his or her own decision. Brief of United States at 13-17. According to the United States, a trial judge's grant of a directed verdict during a continuing trial is *never* final for Double Jeopardy Clause purposes so long as the judge enjoys inherent authority to revisit his or her own rulings any time before final judgment. *Id.* at 14-16. To explain the result in *Smalis* itself, the United States contends that since the prosecution was able to take an interlocutory appeal, the midtrial acquittal there must have been sufficiently final to preclude reconsideration. *Id.* at 16-17.

The United States' attempt to distinguish *Smalis* fails for at least four reasons. First, nothing in this Court's decision in *Smalis* hinged on the fact that an appeal had been taken. The Double Jeopardy Clause violation this Court condemned was not the appeal but "subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence," however that might occur. *Smalis*, 476 U.S. at 145. The appeal in *Smalis* was relevant only because a "successful postacquittal appeal by the prosecution *would lead to proceedings that violate the Double Jeopardy Clause*" and therefore "the appeal itself has no proper purpose." *Id.* (emphasis added). *Smalis* flatly holds that postacquittal factfinding is always unconstitutional, and nothing in *Smalis* remotely suggests that postacquittal factfinding would somehow become constitutional if no appeal was involved.

Second, the procedural posture of *Smalis* itself directly contradicts the United States' argument. This Court's opinion certainly never suggested that the appeal proved that the trial judge's acquittal was somehow more final than other midtrial acquittals. In fact, the Pennsylvania Superior Court had explicitly refused to decide whether it was a final order at all. 480 A.2d at 1048 n. 1

("we do not decide whether the court's order in this case was interlocutory or sufficiently final to permit appeal"). The line the United States attempts to draw between a midtrial acquittal sufficiently final to allow an interlocutory appeal and a midtrial acquittal still subject to later reconsideration cannot even explain *Smalis* itself because the trial judge there agreed to reconsider his decision *after* the prosecution had already appealed it. *Id.* at 1048 & n. 2 (noting that trial judge reconsidered and reaffirmed acquittal after prosecution appealed). Therefore, this Court could not possibly have concluded that the appeal in *Smalis* made that acquittal more final for Double Jeopardy Clause purposes than all other midtrial acquittals.

Third, the United States' argument would nullify *Smalis* in any case, such as *Smalis* itself, where the defendant still faces further trial on remaining counts. Since the trial judge in *Smalis* did not grant a demurrer on all counts, the defendants faced further trial on those counts after the prosecution's appeal. See 480 A.2d at 1048 n. 1. If the United States is correct that a trial judge may reverse a midtrial directed verdict grant any time before final judgment, then the trial judge in *Smalis* could have reinstated the acquitted charges against the defendants *after* this Court's decision. The United States' argument, if accepted, would have allowed the prosecution to go back to the trial judge in *Smalis* after this Court's decision and obtain precisely the relief, postacquittal factfinding proceedings, that this Court unanimously held the Double Jeopardy Clause forbids. The United States' argument therefore proves too much.

Fourth, the United States' argument would make a criminal defendant's protection from postacquittal factfinding proceedings turn on the irrelevant issue of

whether other charges still remain after the acquittal. As *Smalis* itself demonstrates, however, the Double Jeopardy Clause bars postacquittal factfinding on an acquitted charge even if the defendant faces further proceedings on related charges. See 476 U.S. at 141 n. 1 (recognizing that defendants in *Smalis* faced other charges but "[t]hese other charges are not relevant to this petition"); see also *Green*, 355 U.S. at 187 (holding that defendant facing new trial after successful appeal of second-degree murder conviction cannot be tried for first-degree murder charge where jury implicitly acquitted defendant of first-degree murder).

Ultimately, the United States' attempt to distinguish *Smalis* fails because it confuses finality for purposes of trial procedure with finality for purposes of the Double Jeopardy Clause. As *Smalis* illustrates, these two concepts of finality are different. See also *Clay v. United States*, ___ U.S. ___, 123 S.Ct. 1072, 1076 (2003) ("Finality is variously defined; like many legal terms, its precise meaning depends on context"). A "ruling that as a matter of law the State's evidence is insufficient to establish his factual guilt" is final because it is "an acquittal under the Double Jeopardy Clause," *Smalis*, 476 U.S. at 144, even when, as in *Smalis* itself, the trial will continue on other charges and the judge believes his ruling can be reconsidered under local procedural rules. An acquittal does not become non-final for Double Jeopardy Clause purposes just because the judge could reconsider other midtrial rulings.

As discussed in detail in parts D and E of this argument, *infra*, the United States' position would also allow the trial judge and the prosecutor to whipsaw a defendant in violation of the core principles of the Double Jeopardy Clause. Under the view of the United States, a trial judge

could resurrect a previously dismissed charge after the defendant has fully committed herself to presenting evidence responsive only to the remaining charges or, even worse, after the defendant has presented evidence helpful to the remaining charges but damaging as to the previously dismissed charge. This is precisely the dilemma that Respondent faced as a result of the trial judge's action.

The United States heavily relies on *Swisher v. Brady*, 438 U.S. 204 (1978), for its argument that a trial judge may reverse his or her own grant of directed verdict later in the trial, Brief for United States at 18-21, but *Swisher* is inapposite to this case. In *Swisher*, this Court upheld a Maryland scheme in which a juvenile court judge could reject a master's report recommending acquittal and instead enter a finding of guilt. According to the United States, *Swisher* is analogous to this case because the decision of the juvenile court judge to reject the master's proposed acquittal and enter a finding of guilt is similar to a trial judge reversing his own directed verdict later in the trial. The United States overlooks the fact, however, that it was crucial to the outcome in *Swisher* that the master *lacked the power to acquit* the juvenile. As this Court explained, "[It] is for the State, not the parties, to designate and empower the factfinder and adjudicator. And here Maryland has conferred these roles only on the juvenile court judge." *Id.*, 438 U.S. at 216. In so holding, this Court distinguished *Kepner*: "The differences between the present case and *Kepner* are material. There the trial judge was authorized to try serious criminal cases and enter judgment, either of acquittal or conviction. The Philippine trial judge did not serve as an 'assistant' or master of the Philippine Supreme Court for the purpose of

making proposed findings to the appellate judges." *Swisher*, 438 U.S. at 217 n. 15.

The key to the result in *Swisher*, then, is not that the process there amounted to one continuous proceeding but that the juvenile judge's decision could not possibly amount to postacquittal factfinding since the master *could not acquit* the juvenile. Here, the trial judge, like the trial judges in *Kepner*, *Fong Foo*, *Martin Linen*, and *Smalis*, and unlike the master in *Swisher*, did have the power to acquit Respondent and did so. The United States' heavy reliance on *Swisher* is therefore misplaced.

In sum, the Michigan Court of Appeals and the Michigan Supreme Court were both correct in concluding that *Smalis* bars a trial judge from reversing a directed verdict grant later in the trial. If they had ruled the other way, that decision would have been contrary to, or an unreasonable application of, this Court's precedents.

D. A midtrial acquittal, if not immediately reversed, terminates jeopardy on the acquitted counts.

Petitioner, unlike the United States, at least implicitly concedes that the absence or presence of further trial proceedings after a midtrial directed verdict grant may be relevant to determining whether jeopardy had terminated. Petitioner's Brief at 28.[9] Petitioner therefore argues that when, as in *People v. Vilt*, 457 N.E.2d 136 (Ill. Ct. App.

[9] Petitioner overlooks, however, that further proceedings did occur before the trial judge reversed his directed verdict grant. See part E, of this argument, *infra*.

1983), a trial judge announces a directed verdict and then retracts it "practically in the same breath," the defendant has not been exposed to a Double Jeopardy violation. Petitioner's Brief at 38-40. Petitioner concludes that "a rule that a defendant is acquitted as soon as granting words are spoken is both unjust and unworkable." *Id.* at 40.

Respondent, however, has never advocated any such rule and does not do so now. Respondent has no quarrel with the result in *Vilt* and several other cases in which lower courts have held that a directed verdict grant did not amount to an acquittal when it was *immediately* reversed. See, e.g., *Byrne*, 203 F.3d at 673-675 (finding no double jeopardy violation where prosecutor "immediately" moved for reconsideration and trial judge "made it clear that her ruling was not final in the course of the same colloquy in which she announced the decision").

Consistent with *Byrne* and *Vilt*, most other lower courts, including courts from those same two jurisdictions, have concluded from this Court's precedents, including *Smalis*, that there is a bright line that prohibits a trial judge from reversing a midtrial acquittal if any further proceedings have occurred or a recess has been taken after the grant of the directed verdict. See, e.g., *Blount*, 34 F.3d at 868-869 (judge's oral grant of directed verdict, followed by presentation of defense evidence, precluded reconsideration next morning); *Millanes*, 885 P.2d at 109-111 (judge could not reverse directed verdict grant when prosecution moved for reconsideration after recess); *Brooks*, 827 S.W.2d at 121-123 (judge's oral grant of directed verdict at close of prosecution's case precluded reversal at close of defendant's case); *Caldwell*, 803 So.2d at 841 (judge could not reverse directed verdict after lunch break and hearing defense case); *Henry*, 769 N.E.2d at 41-44 (judge could not reverse oral directed verdict grant after "short recess" and further argument); *Lowe*, 744 P.2d at 856-858 (judge who orally granted directed verdict motion could not reverse decision next morning even though no trial proceedings occurred in interim); *Barnes*, 9 S.W.3d at 647-651 (Mo. Ct. App. 1999) (judge could not reverse directed verdict after defendant presented evidence); *Blacknall*, 672 A.2d at 1173-1176 (judge could not reverse directed verdict after lunch recess and defendant's testimony).

This bright line rule is consistent with the other rules that precisely mark the points at which jeopardy attaches and terminates. Thus, jeopardy attaches at the moment the jury is sworn, see *Crist v. Bretz*, 437 U.S. 28, 38 (1978), or, in a bench trial, at the moment the first witness is sworn. See *Serfass v. United States*, 420 U.S. 377, 388 (1975). Since jeopardy terminates at the moment of "the discharge of the jury upon returning a verdict of acquittal," *United States v. Jenkins*, 420 U.S. 358, 369 n. 13 (1975), *overruled on other grounds by United States v. Scott*, 437 U.S. 82 (1978), and since a directed verdict grant is equivalent to a jury acquittal, see *Richardson*, 468 U.S. at 325 n. 5; see also *Smalis*, 476 U.S. at 145 ("whether the trial is to the jury or to the bench, subjecting the defendant to postacquittal factfinding proceedings going to guilt or innocence violates the Double Jeopardy Clause"), it follows that jeopardy terminates after a directed verdict is announced and, if appropriate, clarified or confirmed.

As the lower court cases discussed above confirm, a prosecutor may ask a judge who has just announced a

directed verdict for an *immediate* clarification or reconsideration, just as the prosecutor may move for *immediate* clarification of a jury verdict of acquittal or for polling of the jury. Cf. Fed. R. Crim. P. 31(d) (providing that court or party may request polling of jury "before the jury is discharged"). However, jeopardy terminates after a directed verdict once the parties have moved on to other matters or a recess has been taken, just as jeopardy terminates when the jury's verdict has been accepted and the jury has been discharged. When the judge and the parties move on to other matters or take a recess after a directed verdict grant, that action clearly signals that any questions as to the content or validity of the judge's acquittal have been resolved, exactly as the discharge of the jury clearly signals that any questions as to the content or validity of the jury's acquittal have been resolved.

While logical consistency is valuable, the bright line the courts have drawn between immediate reversals of directed verdict grants and reversals later in the trial is especially important because that line serves to protect the core values of the Double Jeopardy Clause. As this Court explained in *Green*, the Double Jeopardy Clause was "designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." 355 U.S. at 187. "[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Id.* at 187-188.

During a continuing criminal trial, these hazards are particularly acute. When the judge acquits a defendant of some, but not all, of the counts against her at the close of the prosecution's case, she is absolutely entitled to rely on that acquittal as she makes what may be the most crucial decisions of her life with regards to the remaining charges. She and her attorney must decide, among many other potential issues: (1) the motions to make, if any, regarding the remaining charges; (2) the witnesses to call, if any, to testify to the remaining charges; (3) whether she should testify herself regarding the remaining charges; (4) whether she should plead guilty to the remaining charges or seek to negotiate a plea bargain; (5) the special jury instructions, if any, she should request for the remaining charges; and (6) the tangible evidence, if any, she should present regarding the remaining charges.

A defendant must make all or most of these crucial decisions during the short interval of time, typically a recess, between when the judge decides the directed verdict motion and the beginning of the defendant's case. The defendant cannot possibly make these decisions in an intelligent manner if she must also wonder whether the trial judge might, at some point later in the trial, bring back the charges that were just dismissed.

Therefore, once a directed verdict of acquittal is announced and the parties move on to other matters or take a recess, the defendant must be able to rely on that acquittal as she litigates those other matters. If the trial judge is free to resurrect charges previously dismissed, the defendant cannot safely make any decisions as to trial procedure or strategy without running the risk that those decisions will backfire if and when the judge later reinstates the acquitted charges. She must therefore remain in

a heightened state of "anxiety and insecurity" throughout the trial and "even though innocent [she] may be found guilty." *Green*, 355 U.S. at 187-188. If the charges are indeed brought back later in the trial, she also endures "repeated attempts to convict an individual for an alleged offense." *Id.* at 187.

This Court has specifically recognized that an overnight recess is a critical time during a criminal trial because:

> It is common practice for an accused and counsel to discuss the events of the day's trial. *Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed*. The lawyer may need to obtain from his client information made relevant by the day's testimony, or may need to pursue inquiry along lines not fully explored earlier.

Geders v. United States, 425 U.S. 80, 88 (1976) (emphasis added); see also *Perry v. Leeke*, 488 U.S. 272, 284 (1989) (matters normally discussed during overnight recess include "availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain").[10]

[10] In *Perry*, this Court upheld a court order preventing a defendant who was testifying in his own defense from speaking with his lawyer during a 15-minute recess only because such an order may be necessary to prevent the defendant from discussing his testimony while in progress. *Id.* at 283-284. Even for such a short recess, however, this Court recognized that it would be appropriate to permit the defendant to speak with counsel on matters other than his ongoing testimony. *Id.* at 284 & n. 8.

The core values of the Double Jeopardy Clause protect a defendant who must make difficult, even life-altering, decisions during an ongoing criminal trial or during recesses in that trial. If the defendant has been acquitted of some charges, she must be able to make those decisions about the remaining charges without having to face the possibility that those decisions will blow up in her face once the judge brings back the acquitted charges.

Most of the courts faced with this problem have thus correctly held that a directed verdict of acquittal, once rendered, may not be reversed later in the trial. That bright line is consistent with the other bright lines drawn for the attachment and termination of jeopardy, and it protects the values of the Double Jeopardy Clause. Further, as most of the lower court decisions cited by Petitioner demonstrate, there has been no difficulty in administering such a rule. An immediate reversal of a directed verdict grant may be permissible, but a reversal later in the trial is not.

E. Respondent was subjected to postacquittal factfinding proceedings in violation of the Double Jeopardy Clause when the trial judge reversed the acquittal on the first-degree murder count later in the trial.

Applying these principles to this case is straightforward. On March 31, 1992, at the close of the prosecution's case and after argument of counsel, the trial judge granted Respondent's motion for a directed verdict on the first-degree murder count, finding that the prosecution had failed to prove the essential element of premeditation. J.A. 12-13. The trial court recorded the directed verdict grant in the court's official docket entries for March 31, 1992.

J.A. 1. Respondent's jeopardy on the first-degree murder count therefore terminated on March 31, 1992.

After the directed verdict grant, the attorneys and the court immediately moved on to discuss and litigate a variety of other trial matters, including whether both juries would be present as each defendant presented his case, the order in which the defendants would present their cases and the expected length of the testimony, the procedure by which the prosecutor would formally announce to each jury that he had completed his case, and whether certain witnesses would be allowed in the courtroom during portions of the trial unrelated to their testimony. J.A. 13-18. As Respondent and his counsel litigated and made decisions on those other matters, he had already been acquitted of first-degree murder. The judge and the parties had moved on to other matters, and he was entitled to rely on the acquittal as he made decisions on how to defend the remaining charges.

After those issues were resolved, Respondent was removed from the courtroom for the day. J.A. 18. Thus, when Respondent left court on March 31, 1992, he knew he had been found not guilty of first-degree murder, an understanding his attorney also shared. See J.A. 34 ("it was my firm impression and belief that the Court had made a ruling").

Only after Respondent had been removed did the prosecutor mention for the first time that he would like to "make a brief restatement in terms of the First Degree Murder" the following morning. J.A. 18. The judge replied, "Yes, I'll be glad to hear it. Sure, I'm always glad to hear people." *Id.* The prosecutor's statement certainly did not amount to a motion for reconsideration, nor did the judge

indicate that his earlier decision was subject to reconsideration. Even if the prosecutor's comment could somehow be construed as a motion for reconsideration, it was too late. Respondent and his counsel had moved on to other issues after the acquittal, a significant amount of time had passed, and Respondent was no longer even present. By the time the prosecutor made his comment, Respondent's jeopardy on the first-degree murder count had terminated.

After this brief exchange, trial recessed for the day, with Respondent's defense to the remaining charges to be presented the following day. Thus, Respondent and his attorney had an overnight recess to plan his defense to the remaining charges and to make all of the necessary strategic and tactical decisions inherent in presenting a defense. See *Geders*, 425 U.S. at 88. Respondent therefore had to make extremely important decisions, namely, how to defend a second-degree murder charge the next day, while laboring under the belief that the first-degree murder charge was gone forever. The core principles of the Double Jeopardy Clause must entitle a defendant who has just been acquitted of some charges to plan his defense to any remaining charges secure in the knowledge that his decisions cannot result in his conviction on the acquitted charges.

This Court has consistently recognized that jury acquittals and directed verdicts are equivalent. See, e.g., *Richardson*, 468 U.S. at 325 n. 5. Therefore, the events that occurred on April 1 and April 2, 1992, are the constitutional equivalent of bringing a jury back the day after it has returned a not guilty verdict, allowing the prosecutor to make an improved closing argument, forcing the defendant to present his case and decide whether to testify without telling him the identity of the highest charge he

might face, and allowing the jury to change its mind and convict the defendant the day after that.

On April 1, 1992, the prosecutor delivered a lengthy argument to the judge that there was sufficient evidence of premeditation to survive a directed verdict motion. J.A. 21-33. Even after hearing this argument and the objections of Respondent and his codefendants that the Double Jeopardy Clause barred reconsideration, J.A. 32-36, the trial judge still did not reverse his acquittal. Instead, he took the matter under advisement. J.A. 42-43.

Thus, when Respondent presented his entire defense case and testified in his own defense on April 1, 1992, he *still* stood acquitted of first-degree murder. At that point, Respondent was in a completely untenable position if, as the judge ultimately ruled, he could bring back the first-degree murder charge.

At the time Respondent testified, the highest charge against him was second-degree murder, but the jury would also be allowed to consider the lesser charge of manslaughter.[11] Respondent therefore could choose to testify in attempt to persuade the jury that he had been provoked or that he was aware of the risk of death and had acted in a reckless fashion, but doing so obviously ran the risk that the jury could use the very same testimony to establish that Respondent had thought about his actions beforehand, i.e., had premeditated. When making his most fundamental decision to testify in his own defense,

[11] In fact, one of Respondent's codefendants was convicted of manslaughter. Pet. App. 14a.

Respondent was entitled to rely on the acquittal he had received the day before.

Finally, the next day, April 2, 1992, one day after Respondent had presented his entire case and testified himself, the trial judge reversed the directed verdict grant and reinstated the first-degree murder charge. J.A. 45-46. By that point, two full days of further trial proceedings had occurred from the time that Respondent had been acquitted.

A defendant is not required to demonstrate prejudice, beyond the prejudice inherent in being tried twice for the same offense, to obtain relief for a Double Jeopardy Clause violation. In *Smalis*, for example, this Court granted relief without considering whether a reversal of the acquittal would have impaired the defendants' ability to defend themselves.

Similarly, Respondent does not have the burden of demonstrating specific prejudice to his defense to obtain relief. Even if such a showing were required, however, it is clear that Respondent has established that the Double Jeopardy Clause violation in this case was far more prejudicial than the one in *Smalis*. If this Court had allowed the prosecution in *Smalis* to obtain a reversal of the demurrer grant, the defendants would at least have known with certainty the identity of the charges against them when their trial resumed. Respondent, by contrast, was forced to prepare to defend himself, make strategic choices, litigate procedural motions, and testify in his own defense, all while reasonably believing that he had been finally acquitted of first-degree murder.

On this record, it is clear that Respondent was acquitted of first-degree murder on March 31, 1992, and that he

was subsequently subjected to "postacquittal factfinding proceedings going to guilt or innocence" in violation of the Double Jeopardy Clause. *Smalis*, 476 U.S. at 145. Respondent is therefore entitled to have his first-degree murder conviction reduced to second-degree murder and to be resentenced accordingly.

CONCLUSION

Respondent Duyonn Andre Vincent requests that this Court affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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